No. 4889

United States Circuit Court of Appeals

For The Ninth Circuit

KITSAP COUNTY TRANSPORTATION COMPANY, a corporation,

Appellant,

—VS.—

ELLA J. HARVEY, Claimant of the Gas Screw "SUQUAMISH," her tackle, apparel and furniture,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. GEORGE H. BOURQUIN, *Judge*

REPLY BRIEF OF APPELLANT

BYERS & BYERS, and
JOHN A. HOMER,
Proctors for Appellant.
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REPLY BRIEF OF APPELLANT

We do not desire to reply to the brief of the appelee, deeming it unnecessary, further than to review it for the purpose of clarifying confusing or partial statements. We do not think that the appellee has called the attention of this court to any decisions in any way controverting or conflicting with the decisions set forth in our opening brief, which we think amply sustain our contention in regard to the errors set forth. Indeed the brief of counsel for the appellee

is more of an argument as to what he thinks the law should be than what it really is, and either is quite frank or unfortunate in the tacit admissions therein that the law is not in appellee's favor in the instant case.

It is admitted that all preliminary proceedings were properly taken by petitioner to avail itself of its right to limit its liability, including the due appraisement of the vessel and that the same was only of the value of approximately one-half of the claim of the appellee. This removes any applicability of some of the citations of appellee to the instant case. *Shipowners & Merchants Tug Boat Co. v. Hammond Lumber Co.*, 134 C.C.A. 575 is an illustration.

For brevity we follow the arrangement of appellee's argument and call the court's attention to the following points:

I

Counsel for appellant admits (page 3) that the decision of the Circuit Court of Appeals for the Second Circuit in the *Bouker* case supports our contention. That the trial court must find negligence, otherwise there is no claim and the petition for limitation must be granted. But he contends that this is bad law because it compels a claimant to come into the federal court and litigate on the merits "before ever considering the ship owner's right to limitation." As a matter of fact, all parts and phases of such a case are and should be disposed of at one time in one proceeding before one tribunal. Under the law, that tribunal must be a federal court of admiralty. Manifestly the existence or non-existence of negligence is a funda-

mental issue in this class of cases, the determination of which is necessary to a final determination of the proceedings, for, as was said in the *Bouker* case, if there was no fault or negligence for the ship owner to be privy to, there is no liability to be limited and the court should grant the petition.

II

Counsel contends (page 11) that "inasmuch as the proximate cause of the injury is and was the condition of the hull, which the owner * * * was * * * privy to, * * * appellant * * * cannot limit and the court is without jurisdiction to go further." As pointed out in our opening brief, the learned trial judge did not decide what was the proximate cause of the injury, but apparently held, in granting claimant's motion to dismiss, that "if she has any case it is because of a condition of the hull." In other words, the right of a ship owner to limit liability can be precluded by a plaintiff in the state court by alleging that the injury complained of was from negligence because "of a condition of the hull." But, in addition to what has been said in this regard in our opening brief, we call attention to the fact that in the present case the claimant was not content to rest her claim upon the allegation of the structural condition. The step in and of itself was harmless. So, as a second allegation of negligence she charges that the officers of the vessel failed to warn her to step up or down. This is, we submit, an allegation as to the manner in which the vessel was operated. If it states an act of negligence, which, as we believe, it is demonstrated that it does not, it is an act pertaining to the management

of the vessel, not to a known defect of the steaming apparatus or of the hull. Why then should the ship owner be summarily refused a decision on the merits of the petition to limit liability when the allegations of the claimant include matters obviously within the scope of the limitation statue. It is our contention that the right of limitation, through the appropriate proceedings, is open to the ship owner whenever any claim is presented against him regarding which the petitioner apprehends damage beyond the value of his ship. The United States District Court has jurisdiction if any part of the claim is of a nature not excepted from the operation of the act and the mere allegation of exception itself does not preclude jurisdiction. But the court will hear all of the issues and determine (1) whether there be any negligence in the case, and (2) if so, in what regard, that is, whether in the management of the vessel or from defects of the hull, etc., and (3) then whether of the particular negligence established there was any knowledge of the owner.

The above, we think, substantially reviews the brief of the appellee up to "Statement of Facts" on page 19. That statement, we think, is practically correct so far as it goes, though it might be somewhat supplemented. We again call attention to claimant's own testimony where she testifies that she did not look; that she could have seen; that there was absolutely nothing done by the appellant to obstruct her view of the step at all times; that she knew she had to step up and could very plainly see that she had to step down when she left.

On page 22 counsel says:

> "Was petitioner not in fault in providing a structure that *would permit one to fall in* such a manner?"

The same question might be asked in regard to the deck rail over which one could very readily fall into the sea, if he took no care of himself, but over which one is not at all likely to fall if he exercises the usual care. But this question really unmasks the theory of counsel which is that the petitioner was really an insurer of passengers; that it must provide a vessel with equipment that *will not permit any injury to the passenger* unless caused by the passenger's deliberate intent. On page 24, under this heading, counsel discusses matters not in issue, that is, carriers of goods and matters about which there is no dispute so far as carriers of passengers are concerned. We concede it to be the duty of the carrier to exercise the highest degree of diligence and that the marine carrier is not differentiated from other carriers in that respect, so the long and laborious argument of counsel in regard to this matter is quite superfluous.

On page 27 of his brief counsel says:

> "It is difficult to perceive a situation where the owner could design, build and for ten years maintain a vessel in a defective condition and escape the effect of the requirements that he shall be without privity or knowledge of the defective condition which has caused the injury."

In the first place, this is an assumption contrary to the facts or the evidence so far as the instant case is concerned, but an owner would scarcely surmise a

thing to be defective so that it might cause an injury when for those ten years not a single person had been injured by it, though half a million had used it, and thus the longer it was so safely used and the greater the extent to which it was safely used, would not only prevent him from having any knowledge that it was defective, but would cause him to have a fixed and abiding faith that it was in good condition, especially so long, as in the instant case, it is conceded that it was maintained in the same state of repair as when originally installed.

Again on page 29 counsel states:

> "Does not the occurrence of the injury itself furnish a negative answer to these inquiries?"

He is referring to a number of questions he has previously proposed in regard to requirements of the vessel, disregarding the law that the occurrence of an accident in matters of this kind is not any evidence of negligence. But would not the obvious answer be that the use by 500,000 others would be an affirmative answer to his queries?

In his summary on page 30 counsel drops into the rather common fault of stating partial truths. He states that "The record shows that the efficient and proximate cause of the injury was due to the physical condition of the vessel which the petitioner had for years knowingly used and maintained."

The cause of the injury was claimant's carelessness. The physical condition of the vessel was indeed intentionally maintained because it was a proper condition, but as long as the petitioner did not know, not

alone the condition, but did not know that it was improper or defective, it is wholly immaterial so far as the right to limit its liability is concerned. It would be entitled to limit its ability if the vessel were in fact defective, if the defect was unknown to the petitioners. It would be impossible for the petitioner to show lack of privity if it was not shown in this case. All the evidence is to that effect.

IF THE LIMITATION IS GRANTED.

Under this heading, on page 31, counsel states:

"(a) That the injury would not have happened but for the drop from the platform to the aisle;

(b) Failure to warn of a condition."

(a) This may be true. In the same sense, the injury would not have happened had the owner never built the vessel, or never placed seats upon it, or never carried passengers.

(b) The failure to warn has been alluded to heretofore, but we call attention to this—that the appellee had, as a matter of fact, been subjected to just the same kind of danger when she walked up the gangplank to the boat, or down the stairs to the cabin, where she would, in all probability, have been apt to injure herself had she followed the same methods as she did in the instant matter by failing to exercise her faculties. If warning in the instant case was necessary, the boat would be so covered up with warning signs that one extra would not attract notice or occasion comment.

ANSWERS TO SPECIFIC STATEMENTS OF APPELLANT

Under this heading at page 33 counsel says:

> "Appellant states that appellee's witnesses stated that 'Suquamish' was built like all other vessels of her class."

Appellant's witnesses made no such statement. What they did state was that the arrangement complained of was of a common and standard type in vessels of the class of the "Suquamish" which, if true, relieves the petitioner from liability—a really different statement from what counsel has stated above. Four witnesses for the petitioner each stated that there were about 100 vessels of the class of the "Suquamish" on the Sound and each one named two or three that he remembered. None of them pretended to remember all of the vessels of this class or in fact only a very few of them and they gave illustrations of the type. The testimony of Mr. Taylor is typical. On cross-examination by Mr. Martin, appellee's counsel, record page 58, he says:

> "Q. How many vessels do you know about?
>
> A. I know about all there is on Puget Sound.
>
> Q. How many vessels on Puget Sound?
>
> A. Well about 90 plying the passenger trade. I would not say how many around Seattle. I know those.
>
> Q. How many of these vessels are equipped with this center aisle and raised platform above the aisle extending out on each side?
>
> A. I would not say I knew how many; there are a good many.
>
> Q. Well, how many vessels?

A. I don't know how many.

Q. You could not tell us the name of one vessel equipped in that manner?

A. 'Dr. Martin,' the 'Falcon,' another which I think is called the 'Speeder,' and the 'Chicker,' about the size of the 'Suquamish.' "

On page 34 of his brief counsel states:

"Appellant, in drafting its petition, was evidently not familiar with the terms of U.S.R.S. 4993, and did not appreciate the importance of making it appear that the sunken aisle and raised platform were not a part of the hull, for it alleged in its petition for limitation of liability, in paragraph 2, page 6 of the transcript of the record * * * that the defects complained of in the vessel were in truth and in fact a part of the original structure of said vessel, etc."

Evidently counsel is more familiar with Sec. 4993 than he is with vessel construction, and seems to be under the delusion that if the defects complained of were a part of the original structure they must be a part of the hull of the vessel. Let us, for a moment, assume that he is correct. He then brings the case squarely within his citation of the "Erie Lighter" which he would cite as authority, but the court, in that cause, allowed the limitation of liability because the injuries were "due solely to a structural defect of the Lighter," which was the matter for which limitation was prayed in that proceeding, and what shall he say of *Savage v. N. Y. & N. H. S. S. Co.*, 185 Fed. 778, which holds that negligence cannot be predicated upon defects in the original structure of the vessel?

Cases Cited By Appellant

Under this head, page 35, counsel calls attention to *Johnson v. Port Washington Route*, stating it was not a maritime case. It was, however, a case against a maritime carrier so the measure of negligence is identical and the Supreme Court of the State of Washington holds that under an identical condition the carrier was not negligent. We submit, however, that

Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578;

Savage v. N. Y. & N. H. S. S. Co., 185 Fed. 778;

84-H *Appeal of Bouker Contracting Co.*, 296 Fed. 427,

are controlling authorities in this case and that the "Erie Lighter" and the "Annie Faxon" are in reality not authorities against the contention of appellant, but in its favor, and we therefore respectfully submit to this court that this cause should be reversed and that it make the appropriate orders in that behalf.

Respectfully submitted,

Byers & Byers, and
John A. Homer,
Proctors for Appellant.